75-843

IN THE

SUPREME COURT OF THE UNITED STATES

NO. A-514

TIMOTHY C. BENISH and MICHAEL GAICH
Petitioners

vs.

UNITED STATES
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Dante G. Bertani
Bertani, Myers & Makoski
Counsel for Petitioners

Room 214
Union Trust Building
Main Street
Greensburg, Pa.

INDEX

TABLE OF CONTENTS

Opinion Below 3
Jurisdiction 3
Questions Presented 4
Constitutional Provisions, Federal Statutes 4
Rules and Regulations Involved
Statement 5
Reasons Relied on for the 6
Allowance of the Writ
Conclusion 18
Appendix 19

CITATIONS

Cases

Barrett vs. U.S., 322 F. 2d 292 (1963) 16
Ferry v. Ramsey, 277 U.S. 88 (5/14/28) 13
In Re: Winship, 397 U.S. 358 (1970) 15
Leary v. U.S., 395 U.S. 6, (5/19/69) 13
23LEd 2d 57
Malloy v. Hogan, 378 U.S. 1, (6/15/64) 15
12L d 2d 653
Morisette v. U.S., 322 U.S. 246 (1952) 12
Morrison v. California, 291 U.S. 82 (1934) 13
Spevak v. Klein, 385 U.S. 511 (1967) 15
Tot v. U.S. 319 U.S. 463 (6/7/43) 13
87 L Ed 1519
Turner v. U.S., 396 U.S. 398 (1/20/70) 13
24 L Ed 2 610
U.S. v. Fabrizzio, 193 F. Supp. 446 12
(Third Circuit, 1961)
U.S. v. Freed, 401 U.S. 601 (1971) 8
U.S. v. Giordano, 15 CRL 3033 (5/13/74) 17

U.S. v. Margraf 483 F. 2d 708 (1973) 8
Western & Alt. Ry. v. Henderson 15
279 U.S. 639 (1929)

FEDERAL STATUTES, RULES AND REGULATIONS

Statutes

Comprehensive Drug Abuse and 27
Control Act of 1970
Title 21 U.S.C.
Sec. 822 (a) 27
Sec. 841 (a) (1) 27
Sec. 885 28
Sec. 811 (a) 28
Sec. 871 30
Reorganization Plan No. 1 of 1968 30
Title 28 U.S.C.
Sec. 510 30
The Federal Register, Volume 38 No. 115 30
Sec. 1 30
Sec. 8 31
Sec. 9 31

IN THE SUPREME COURT OF THE UNITED STATES

No. A-514

TIMOTHY C. BENISH *and*
MICHAEL GAICH

Petitioners

vs.

UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Timothy C. Benish and Michael Gaich, petitioners pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Third Circuit, centered in their respective cases, tried and reviewed together and involving identical questions, entered in this case October 15, 1975 affirming the judgement of the United States District Court for the Western District of Pennsylvania entered February 27, 1975.

OPINIONS BELOW

The opinions of the Court of Appeals and District Court are not yet officially reported.

The opinions are reprinted in Appendix A & B.

JURISDICTION

The judgment of the Court of Appeals was entered on

October 15, 1975. On December 5, 1975, Mr. Justice William J. Brennan, Jr., extended the time within which to file a Petition for Writ of Certiorari to December 14, 1975. This Court has jurisdiction to review the judgment by Writ of Certiorari pursuant to authority under 28 U.S.C. sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether the procedure provided to establish a substance as a dangerous drug violates the Constitutional right of due process under the Fifth Amendment to the Constitution of the United States?

II. Whether the lack of effective notice of the addition of a drug to a schedule as a controlled substance negates the possibility of the defendants formulating a specific intent necessary to perform an illegal act in violation of the law?

III. Whether it is incumbent upon the Government to prove the non-existence of excepting circumstances in its case in chief where there is evidence brought forward that the defendants may be excepted from the statute?

IV. Whether by the failure of the defendants to present evidence of an appropriate registration or order form, they can be presumed not to be holders of a registration or order form?

V. Whether the establishing of phendimetrazine as a Schedule III substance was done legally prusuant to proper legislative authority?

CONSTITUTIONAL PROVISIONS, STATUTES FEDERAL RULES AND REGULATIONS INVOLVED.

Constitutional Provision Involved:

The due process clause of the fifth Amendment to the United States Constitution

Statutes involved:

(1) Comprehensive Drug Abuse and Control Act of 1970 Title 21 U.S.C. sec. 822 (a), 841 (a) (1), 885, 201, 811 (a) (d) (e) and 871.

(3) Reorganization Plan No. 1 of 1968, Title 28 U.S.C. secs. 509, 510.

Rules and Regulations Involved:

The Federal Register, Volume 38 No. 115. These provisions are set forth in Appendix C attached hereto.

STATEMENT

Petitioners, Timothy C. Benish and Michael Gaich, were charged with violations of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. sec. 841 (a) 1), knowingly and intentionally*** dispensing a controlled substance, and 18 U.S.C. sec. 2 as principal in each allegation) on two separate occasions; on Court I alleged to have occurred on July 25, 1973; your petitioners were acquited; on Count II (the subject of this Petition) petitioners were charged with distributing, in August 1, 1973, 9,886 capsules of "Phendimetrazine a Schedule III controlled substance, and petitioners were found guilty of that charge after a non jury trial on June 27, 1974 before the Honorable Judge Edward Dumbald in the United States District Court for the Western District of Pennsylvania"

Motion for New Trial and/or Arrest of Judgment with supporting Memorandum of Law on behalf of defendant

was timely filed. On February 27, 1975 the Trial Judge denied and overrules defendant's Motions and defendant was directed to present himself for sentencing.

Both Petitioners, Timothy C. Benish and Michael Gaich, were sentenced on April 29, 1975 to make 1/3 restitution of $12.00, pay a fine of $500.00 and be placed on Probation for 2 years.

Petitioners timely appealed their convictions to the United States Court of Appeals for the Third Circuit and after argument on October 15, 1975 before a panel of that Court, that Court affirmed the judgment of the District Court:

Petitioners file this petition and request certiorari from that order.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The question most vital and compelling which the petitioners raise in the present case goes to the very heart of a system which cannot be permitted to grow so huge and so distant from its people as to enact criminal laws which effect its citizen's life and liberty without fair and reasonable notice of what laws its citizens in the future shall be compelled to obey.

I

This case squarely faces the issue can a government of, for and by the people, establish a criminal liability upon its citizens without due process of law. Can a drug be added to that list of controlled substances under the Comprehensive Drug Abuse and Control Act of 1970 on June 15, 1973 with provision **that permits registration** of any person who "manufactures, distributes, dispenses *** or who proposes to engage in the manufacture, distribution, dispensing*** of any of those substances,"

on or before August 1, 1973, and then prosecute one who has allegedly dispensed the substance on August 1, 1973, and at the same time impose criminal liability after the date of June 15, 1973, except for any person who is entitled to register under the registration section. It appears clearly the provisions of the regulation are contradictory on its face and without question violative of petitioners right to due process of law.

It is illogical, unjust, unfair, incomprehensible and unconstitutional to presume that any citizen of the United States of America can be subject to the whim and fancy of the Director of the Bureau of Narcotics and Dangerous Drugs whomever he may be and whatever may be his personal prejudices or biases without a reasonable intelligent effective notice as to what is being designated as an illegal act. There is no difficulty understanding that certain acts of man, are in violation of his fellow mans right to life liberty and the pursuit of happiness and may be designated as criminal offenses. Any sensible, reasoning man knows to covet they neighbors wife or goods or to kill thy neighbor is a crime.

But does every sensible reasoning man know that phendimetrazine, benzphetamine, chlorphentermine, diethylpropion, or trinitrotoluene are dangerous drugs subjecting them to prosecution for possession or delivery. Does notice in the Federal Register distributed to special interest groups but not to the average citizen give proper notice to warn the average citizen of its message. I think not. For trinitrotoluene is not a listed controlled substance but TNT. It is well established that **everyone** is entitled to due process of law under the Fifth Amendment but under the present practice of establishing a controlled substance no one is afforded that right.

As ably put by Lord Coke and carved in the Granite of the rotunda of the University of Pennsylvania, "The Knowe Certaintie of the Law is the Safetie of All."

II

Knowledge of participation in an illegal transaction is an essential element of an offense. In the present case the burden was on the Government to prove the defendants knowingly violated the law by delivering an item knowing that it was in violation of the law to deliver that item, as in **United States v. Freed,** 401 U.S. 91 St. Ct. 1112 (1971) where the defendant was charged with possession of an unregistered firearm by reason of possession of unregistered hand grenades in violation of 26 U.S.C. 5812, although the statute there contains no express intent requirement, the Court held, to convict, the Government must prove knowing possession of the item and also knowledge that the item possessed were hand grenades. In the present case the Government never proved the items (phendimetrazine) were in fact known to be phendimetrazine, a controlled substance. Under the reasoning of the Freed case the Government must prove defendant knew it to be a deadly weapon (in the present case a controlled substance) this is particularly applicable where as in **United States v. Margraf** 483 F. 2d 708 (1973), the item is a pocket knife and has a legitimate use and in the present case, where as stated in the Federal Register Volume 38 the item is a drug with a legal medical use and even more applicable than in the Freed case because the criminal sanctions section of the Act, Sec. 841 specifically requires knowledge and intent; Sec. 841 states:

> (a) Except as authorized by this title, it shall be unlawful for any person **knowingly and intentionally** ***
>
> (1) To manufacture, distribute or dispense a controlled substance (emphasis supplied).

The government failed to prove specific knowledge and intent.

III

Petitioners - defendants contend that at the time of the alleged distributions the federal regulation explicitly permitted their alleged conduct.

Sec. 822 (a) of Title 21, U.S.C., the Comprehensive Drug Abuse and Control Act of 1970, required the registration of individuals manufacturing, distributing, or dispensing drugs.

> (a) Every person who manufactures, distributes, or dispenses **any controlled substance** or who proposes to engage in the manufacture, distribution, or dispensing of **any controlled substance,** shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him. (emphasis added).

Failure to register subjects one to the criminal sanctions of Sec. 841 of Title 21 U.S.C.

> (a) **Except** as authorized by this title, it shall be unlawful for any person **knowingly and intentionally -**
>
> (1) to manufacture, distribute, or dispense a **controlled substance.** (emphasis added).

On May 9, 1973, in Volume 38, No. 89 of the Federal Register, John E. Ingersoll, the Director of the Bureau of Narcotics and Dangerous Drugs proposed regulations to control phendimetrazine as a schedule III substance pursuant to the authority of Sec. 822 (a) of Title 21, U.S.C. On June 15, 1973, Mr. Ingersoll in Volume 38, No. 115 of the Federal Register published his determination to place phendimetrazine in Schedule III. The effect of Mr. Ingersoll's action was to make phendimetrazine a controlled substance and thus made activity conducted in regards to this drug subject to possible criminal penalties. Before this date, phendimetrazine was not a controlled substance and thus not

illegal to possess or distribute under the controlled Substance Act Sec. 841 (a) (1), the regulation also gave notice of the effective date of the enactment of the regulation.

The requirement imposed upon the anoretic substances controlled by this order shall become effective as follows:

1. **Registration** - Unless currently registered to conduct that activity with Schedule III (or, in the case of fenfluramine, Schedule IV) non narcotic substances, or unless exempted from registration by law, or pursuant to 301.24-301.28 or 311.24-311.28 of Title 21 of the Code of Federal Regulations, any person who manufactures, distributes, dispenses, imports, or exports benzphetamine, chlorphentermine, clotermine, fenfluramnne, mazindol, and **phendimetrazine,** or who proposes to engage in the manufacture, distribution, dispensing, importation or exportation of any of those substances, **shall obtain a registration to conduct that activity on or before August 1, 1973.**

8. **Criminal Liability** - Any activity with benzphetamine, chlorophentimine, clotermine, fenfluramine, not authorized by, or in violation of, the Controlled Substance Act or the Controlled Substance Import and Export Act, conducted after June 15, 1973, **except** that any person who is not now registered to handle **these substances but who is entitled to registration under those acts may continue to conduct normal business or professional practice with those substances between the date on which this order is published and** the date on which he obtains the proper registration. (emphasis supplied)

9. Other - In all other respects this order is effective on June 15, 1973.

The regulation makes two substantial changes. **For any person who manufactures, dispenses, or distributes, or who proposes to do so** must register on or by August 1, 1973. Furthermore, any person who is not now registered but who is entitled to register to handle these substances may continue to conduct business until he obtains the proper registration.

From this regulation the petitioners submit two contentions. First: the regulation expressly permits anyone distributing these controlled substances or proposing to distribute them to obtain a registration to conduct such activity on or before August 1, 1973. Second: Petitioners still had the express legal right to obtain a registration, as of the date of their arrest or discontinue any distribution of the controlled substance after the registration deadline August 1, 1973.

Petitioners by **an administrative decision** on the part of the Director of the Bureau of Narcotics and Dangerous Drugs **were excluded from the sanctions of the statute until August 1, 1973.** It is not a question of whether the petitioners possess an exemption or exception and have failed to demonstrate such an exemption. Rather the statute is simply not applicable to them until after August 1, 1973.

Additionally the petitioners contend that the government failed to prove every element of the offense in another aspect. Sec. 8 of the Effective Dates portion of the regulations permits any person entitled to be registered under the Act but not now registered to continue in the normal cause of business until the proper registration is obtained. Therefore the petitioners argue that since no evidence to negate the fact that they are entitled to register under the Act and therefore entitled

to continue to handle these substances, the Government failed to meet its burden of proof.

Once evidence was adduced before the Trial Court concerning the July 25, and August 1, 1973 dates, the issue was raised in the petitioners behalf that they come within the express permission of the regulations either to obtain an appropriate registration or to continue to handle the drug until the registration was obtained as pointed out in **United States v. Fabrizzio,** 193 F. Supp. 446 (1961):

> *** When evidence appears which tends to bring the defendant within an exception, *** the burden is upon the prosecution, on the whole case, to overcome that evidence beyond a reasonable doubt.

Petitioners argue that once the issue was raised that circumstances existed which may except them from the acts santions, it was incumbent on the government to negative those excepting circumstances by showing an intent not to obtain a registration or the fact that they were not entitled to obtain a registration. No presumption can be assumed by the Court that because of a controlled substance, petitioners were not in fact intending to obey the law. Such a presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime, **Morisette v. United States,** 322 U.S. 246, (1952).

IV

The very concept that petitioners can be presumed not to be holders of a registration form flies in the face of the constitutional presumption of innocence, and presumes an illegal act rather than petitioners constitutional right to a presumption of a legal act and conduct innocent within the law and the confines of the Act.

Sec. 885 of Title 21, U.S.C. provides that the failure of an accused to demonstrate that he possesses a proper registration order form shall cause a presumption to arise that the accused possessed no proper registration or order form.

> (b) In the absence of proof that a person is the duly authorized holder of an appropriate registration order form issued under this subchapter, he shall be presumed not to be the holder of such registration or form, and the burden of going forward with evidence with respect to such registration or form shall be upon him.

The existence of a presumption in a criminal prosecution has been subject to various constitutional tests. In **Ferry v. Ramsey,** 277 U.S. 88 the Court there created the "greater includes the lesser" test. If the legislature could act to make the act itself a crime, then the legislature could make the proof of the act presumptive proof of an element of an offense. A second test developed in **Morrison v. California** 291 U.S. 82 (1934) held that based on the showing that a fact was more convenient for the prosecution or for the defense to produce, a statutory presumption could be placed on the party for whom the production of such fact was more convenient. **Tot v. United States**, 319 U.S. 463, however, placed constitutional limitations upon both these tests.

Furthermore, the more recent decisions of **Leary v. United States,** 395, U.S. 6, and **Turner v. United States**, 396 U.S. 398, have completely overturned the former standards for determining the constitutional validity of a criminal presumption.

In the instant case the petitioners submit that proof of the distribution of phendimetrazine cannot constitu-

tionally cause a presumption to arise so that it can be said with substantial assurance that it is more likely than not that the distributor is not the holder of the appropriate registration or order form.

Petitioners contend the probable inference is that a distributor of phendimetrazine would have the proper registration, since it had medically accepted uses. The Federal Register, Volume 38, No. 115 publishes the conclusions of the Secretary of Health, Education, and Welfare and the Director of the Bureau of Narcotics and Dangerous Drugs concerning phendimetrazine.

> The Director has concluded from his review of the current situation that control of anorectic including phendimetrazine, is desirable, at this time to **insure that they will not become widely abused.**
>
> The Ayerst Laboratories has fully cooperated with the Bureau and has consented to the placement of phendimetrazine in Schedule III **to insure that it does not become subject to abuse in the future.** (emphasis added).

Thus the information now available in that phendimetrazine is not now known to be abused.

The Government's own chemist testified to the use of phendimetrazine as a means to control weight.

Unlike the possession of marijuana or strictly hallucinogenic drugs for which there is no medical use and no justification for possession except for infrequent instances of scientific investigation, phendimetrazine does have an accepted use.

Clearly then the real fact is that the distributor of phendimetrazine is generally done in a legally acceptable fashion. It is a drug not widely abused, and therefore it must be presumed to be distributed for medical reasons and not in violation of the law.

The presumption of Sec. 885 fails to pass constitutional muster in other respects. the statute first causes the presumption to arise not by proof but by the absence of proof." "In the absence of proof (a person)...shall be presumed not to be the holder of such registration or order form." Thus the statute shifts the burden to the petitioners to produce evidence and causes a presumption to arise where the petitioners fail to present a defense. The defendants argue that the presumption of Sec. 885 violates their right not to incriminate themselves and their constitutional right to due process.

Unless petitioners prepare a defense and explain their legal right to a registration or order form, they suffer a legal penalty. The penalty consists of a jury instruction they are presumed not to be holder of the appropriate registration or order form. This directly violates the rule of **Malloy v. Hogan**, 378 U.S. 1, that the Fifth Amendment guarantees that "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty...for his silence." **Spevak v. Klein**, 385 U.S. 511 (1967) and **Garrity v. New Jersey** explained the penalty consists of the "imposition of any sanction which makes the assertion of the Fifth Amendment privilege "costly". "In the instant case the petitioners silence causes them to be presumed to lack the proper registration and virtually assures their conviction.

The presumption of Sec. 885 also violates the constitutional due process of petitioner by shifting the burden of proof to the petitioners and effectively destroying their presumption of innocence. **Western and Atl. Ry v. Henderson** 279 U.S. 639 (1929). **In re Winship**, 397 U.S. 358, (1970). held, "that the Due Process Clause protests the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute

the crime with which he is charged." The (reasonable doubt) standard provides concrete and substance for the presumption of innocence, the bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of justice."

The presumption of innocence means that the defendant cannot be required to take any affirmative action to defend himself. Despite all the prosecution's evidence, he is entitled to do nothing in his own defense. As noted by Judge Wisdom in **Barrett v. United States**, 322 F. 2d 292 (1963).

> A person accused of a crime has more than the right to present evidence. He has the constitutional right to sit on his hands 322 F. 2d at 296.
>
> In a criminal prosecution, non-action of the defendant cannot be substituted for action upon the part of the state's case. Neither the burden of proof nor the burden of proceeding with any evidence to prove such case can be imposed upon upon a party charged with a crime. Judge Peaslee in State v. Lapointe, 81 N.H. 227, 123 A. 692, 696, 31 A.L.R. 1212 (1924).

Sec. 885 of Title 21, U.S.C. clearly violates "the unquestioned policy of the criminal law..." that the burden of proving beyond a reasonable doubt all facts necessary to the defendants guilt" is upon the prosecution and not one iota of burden is upon the defendant.

V

Did the Congress of the United States in enacting Sec. 201 (a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 wherein it specifically delegated authority to the Attorney General of the United States to place drugs on the controlled drug schedules intend that authority to be exercised by anyone else or was its language specific enough to evidence a desire that only the Attorney General may add to the schedules of con-

trolled substances, as stated in the Act, at Section 811 (a), "The Attorney General shall***. Except as provided in subactions (d) and (e) of this Section, **The Attorney General** may by rule

> (1) add to such a schedule or transfer between such schedules any drugs or substance***. (emphasis supplied).

It is particularly enlightening to read this specific delegation of authority since it was enacted after Sec. 871 of Title 21 U.S.C. and after Sec. 510 of Title 28 U.S.C. and after the Reorganization Plan No. 1 of 1968 (28 U.S.C. Sec. 509) which the Government contends vested The Attorney General to delegate his authority to "any officer, **employee**, or agency of the Department of Justice***. Can it be the Governments contention that the Attorney General was even authorized to delegate, this authority which Congress specifically gave only to him under the Act, to a janitor an **employee** of the Department of Justice. The Supreme Court specifically held in an analygous situation in **United States v. Giordano**, 15 CRL 3033 (3/13/74) that notwithstanding a section of the law giving general delegating authority, 28 U.S.C. Sec. 510 which authorized the Attorney General to delegate his functions **to any other officer, employee or agency** of the Justice Department that Section 2516 (1), dealing with wiretapping, fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General.

It seems clear that in the instant case that a Comprehensive Act designed to control drugs the Congress was again limiting the Attorney Generals delegative authority. The Court in Giordano held the Governments argument that the general delegative authority was sufficient to permit the Attorney General

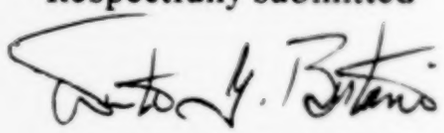
to delegate his authority in that matter unexceptable and went on to say that despite such a general delegative section "Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated."

Congress could be no clearer than in the case at bar, it gave that authority specifically to the Attorney General, therefore the drug phendimetrazine was never legally and properly established as a controlled substance.

CONCLUSION

For all the foregoing reasons and primarily to prevent the further and continued violation of every citizens right to due process of law, so that every citizen may be properly advised of the "known certaintie of the law," this petition for a Writ of Certiorari should be granted.

Respectfully submitted



DANTE G. BERTANI
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 75-1578/1579

UNITED STATES OF AMERICA

v.

TIMOTHY C. BENISH
ROBERT H. SISCO
MICHAEL GAICH

TIMOTHY C. BENISH, Appellant in No. 75-1578
MICHAEL GAICH, Appellant in No. 75-1579

Appeal from the United States District Court
for the Western District of Pennsylvania
(District Court Criminal Action No. 73-280)

Argued October 15, 1975
Before: **ALDISERT, FORMAN** and **ADAMS, Circuit Judges.**

JUDGMENT ORDER

After considering the contentions raised by appellants, to-wit, that the court erred: (1) in that the Government failed to prove the non-existence of excepting circumstances in its case in chief where there is evidence brought forward that the appellants may be excepted from the statute; (2) in presuming that appellants were not holders of an appropriate registration or order form; (3) in permitting establishing of phendimetrazine as a Schedule III substance without proper legislative

authority; (4) in permitting a conviction when the Government failed to prove every essential element of its case against the appellants; (5) in permitting a conviction in the face of lack of effective notice of the addition of a drug to a schedule as a controlled substance which negated the possibility of the appellants formulating a specific intent necessary to perform an illegal act in violation of the law and (6) in permitting a conviction in the face of a procedure provided to establish a substance as a dangerous controlled drug contended to violate appellants' right to due process under the Fifth Amendment to the Constitution of the United States; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT

/s/ Aldisert

Circuit Judge

Attest:

/s/ Thomas F. Quinn

Thomas F. Quinn, Clerk

DATED: Oct. 15, 1975

Certified as a true copy and issued in lieu of a formal mandate on November 6, 1975.

Test: Thomas F. Quinn

Clerk, United States Court of Appeals for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
Plaintiff,

Criminal No. 73-280

v.

TIMOTHY C. BENISH and
MICHAEL GAICH
Defendants.

O P I N I O N

Dumbauld, J.

Defendants, following a non-jury trial, were convicted of the charges contained in Count 2 of the Indictment (but acquitted under Count 1, relating to transactions on a different date). Count 2 charged violation of 21 U.S.C. 841 (a) (1) on or about August 1, 1973, in that defendants distributed 9,886 capsules of "Phendimetrazine, a Schedule III controlled substance." Motions in arrest of judgment, or for new trial, are pending.

The so-called "Comprehensive Drug Abuse Prevention and Control Act of 1970" established five classes of "controlled substances." Schedule III included drugs having less "potential for abuse" than those specified in Schedules I and II. **21 U.S.C. 812 (c)** established an initial list of Schedule III drugs, and by **21 U.S.C. 811(a)** the Attorney General was empowered "by rule" to add to any Schedule "any drug or other substance" if he finds "that such drug or other substance has a potential for abuse." Such "rules" must be formulated pursuant to the rulemaking procedures of the Administrative

Procedure Act (**5 U.S.C. 551 et seg.**) which require due notice, hearing, and the like (**5 U.S.C. 553**).

Defendants contend that the Attorney General must act personally in order to add a new substance, such as phendimetrazine, to Schedule III, relying upon **U.S.** v. **GIORDANO,** 416 U.S. 505, 510, 513-16 (1974). At the request of the Court this issue was briefed by the parties.

However, we are confirmed in our initial impression that **GIORDANO** is inapplicable here. That case related to the authorization of wire-tapping, which is commonly regarded as an improper "dirty business"[1] except under unusual conditions. Accordingly Congress insisted that such activities be engaged in only pursuant to "the mature judgment of a particular, responsible Department of Justice official." Hence 18 U.S.C. 2516 specified that authority to permit wire-taps should be vested in a small circle of specifically enumerated officials, namely "the Attorney General, or any Assistant Attorney General specially designated by the Attorney General."

In the case at bar, however, we do not confront a situation involving delicate policy issues of law enforcement. We face a technical chemical problem. It would truly be incongruous to trust the personal professional opinion of any lawyer on such a question[2] rather than the judgment of a qualified hearing examiner in a unit established to deal with such technical questions. This is especially true when the action must be taken "by rule" under the requirements of the Administrative Procedure Act. It would be strange if Congress had meant to

1 Either immoral, illegal, or unconstitutional, as the case may be. See **OLMSTEAD** v. **U.S.,** 277 U.S. 438, 470 (1928); **IN RE MARCUS,** 491 F. 2d 901, 903-904 (C.A. 1, 1974); **KATZ** v. **U.S.** 389 U.S. 347, 353 (1967).

require a Cabinet officer to devote his days to protracted hearings on technical questions, such as the proper amount of peanuts to be included as an ingredient of peanut butter,[3] or the potentiality for abuse of particular varieties of drugs (or even their safety or efficacy).

We therefore conclude that phendimentrazine is indeed a Schedule III controlled substance. It became such on June 15, 1973, pursuant to an order, dated June 12, 1973, signed by John E. Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs in the Department of Justice,[4] and published in the Federal Register of June 15, 1973 (Vol. 38 No. 115, pp. 15719-22).

Paragraph 1 of the provisions in the order of June 15, 1973, regarding effective dates, required persons distributing or proposing to distribute phendimentrazine to "obtain a registration to conduct that activity on or before August 1, 1973."

Paragraph 8 subjected to criminal liability any activity with said drug not authorized by, or in violation of, the Act of 1970, occuring after June 15, 1973, except that any person not registered "but who is entitled to registration "may" continue to conduct normal business or professional practice with those substances between the date on which this order is published and the date on which he obtains the proper registration."

2 Although judges must decide patent cases. See Henry J. Friendly, **FEDERAL JURISDICTION: A GENERAL VIEW** (1973) 156-57.

3 Joseph C. Goulden, **THE SUPERLAWYERS** (1972) 186-87; Richard A. Merrill and Earl M. Collier, Jr., "Like Mother Used to Make": An Analysis of FDA Food Standards of Identity," 74 Col. L.R. (May, 1974) 561, 585-91; **CORN PRODUCTS CO.** v. **DEPT. OF H.E.W.,** 427 F. 2d 511 (C.A. 3, 1970). The administrative proceedings began in 1959 and ended in 1968.

Defendants contend that this "grandfather clause" made their dealings in phendimetrazine legal up until August 1, 1973.

Disregarding complexities regarding computation of time,[5] it suffices to point out that the Indictment alleges that the offense occurred on or about August 1, 1973, and that the regulation required registration "on or before August 1, 1973." There is no evidence in the record either that defendants had obtained (or had even applied for) registration before August 2 succeeded August 1 in history. Nor is there any evidence that defendants during the period between June 15, 1973, and August 1, 1973, were "entitled to registration" permitting them to handle phendimetrazine.[6]

4 **THE DIRECTOR'S AUTHORITY IS ESTABLISHED BY 21 U.S.C. 871, 28 U.S.C. 510,** Reorganization plan No. 2 of 1973 (28 U.S.C. 209, pocket part); and Section 0.100 of Title 18 CFR, which provides:

S0.100 General Functions

Subject to the general supervision of the Attorney General, and under the direction of the Deputy Attorney general, the following described matters are assigned to, and shall be conducted, handled, or supervised by, the Administrator of the Drug Enforcement Administration:

(a) Functions vested in the Attorney General by sections 1 and 2 of Reorganization Plan No. 1 of 1968.

(b) Functions vested in the Attorney General by the Comprehensive Drug Abuse Prevention and Control Act of 1970.

(c) Functions vested in the Attorney General by section 1 of Reorganization Plan No. 2 of 1973 and not otherwise specifically assigned.

5 See Rule 45 (a) FRCrP, and the common law rule that fractions of a day are to be disregarded.

6 By the time of trial in 1974 the existence **VEL NON** of registration by August 1, 1973, should have been easy to prove.

Defendants contend that it was the burden of the Government ot establish their non-entitlement as part of the crime.

The Act of 1970 provides that a person distributing or proposing to distribute a controlled substance must obtain a registration, which authorized them to engage in such activity. 21 U.S.C. 822. Knowingly and intentionally to distribute a controlled substance except as authorized by the Act is made criminal by 21 U.S.C. 841 (a).

It is provided in 21 U.S.C. 885 (a) (1) that the Government need not negative any statutory exemption or exception in any indictment or in any trial, but that "the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit."

It will be noted that this is a purely procedural presumption. It places on the defendants (who are presumably most familar with and best able to demonstrate their own qualifications and efforts to obtain registration) to go forward with the evidence. It does not establish any **irrebuttable presumption,** which might be regarded as a substantive rule of law like the "parol evidence rule."

Hence this fully rebuttable and procedural presumption is not subject to the due process condemnation of the types of presumption involved in the cases on which defendants rely: **TOT** v. **U.S.,** 319 U.S. 463, 466-68 (1943); **Leary** v. **U.S.**, 395 U.S. 6, 36-37 (1969). Cf. **Turner** v.**U.S.**, 396 U.S. 398, 408, 423 (1970). See also "The Irrebuttable Presumption Doctrine in the Supreme Court", 87 Harv. L.R. (May, 1974) 1534-56.

Accordingly, defendants' motions are overruled, and they are directed to present themselves for sentence in due course.

ORDER

AND NOW, this 27th day of February, 1975, upon consideration of defendants' motions in arrest of judgment and for new trial, for the reasons set forth in the foregoing opinion.

IT IS ORDERED that said motions be and they hereby are denied and overruled, and defendants are directed to present themselves in due course for sentence.

/s/ Dumbauld

United States District Judge

Richard L. Thornburgh, Esq.
United States Attorney
Pittsburgh, Pa. 15219

Bertani, Myers & Makoski
Attorneys-at-Law
Union Trust Building
100 North Main Street
Greensburg, Pa. 15601

APPENDIX C

AMENDMENT V
CONSTITUTION OF THE UNITED STATES

"No person shall*** be deprived of life, liberty or property without due process of law."

STATUTES

Comprehensive Drug Abuse and Control Act of 1970.
Title 21 U.S.C.

Sec. 822 (a)

(a) Every person who manufactures, distributes, or dispenses **ANY CONTROLLED SUBSTANCE** or who proposes to engage in the manufacture, distribution, or dispensing of **ANY CONTROLLED SUBSTANCE,** shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him. (emphasis added).

Sec. 841 (a) (1)

(a) **EXCEPT** as authorized by this title, it shall be unlawful for any person **KNOWINGLY AND INTENTIONALLY**

(1) to manufacture, distribute, or dispense a **CONTROLLED SUBSTANCE** (emphasis added).

Sec. 885

(a) (1) It shall **NOT** be necessary, for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or **IN ANY TRIAL,** hearing, or other proceeding under this subchapter and the **BURDEN OF GOING FORWARD WITH THE EVIDENCE WITH RESPECT TO ANY SUCH EXEMPTION OR EXCEPTION SHALL BE UPON THE PERSON CLAIMING ITS BENEFIT.**

(b) **IN THE ABSENCE OF PROOF THAT A PERSON IS THE DULY AUTHORIZED HOLDER OF AN APPROPRIATE REGISTRATION OR ORDER FORM ISSUED UNDER THIS SUBCHAPTER, HE SHALL BE PRESUMED NOT TO BE THE HOLDER OF SUCH REGISTRATION OR FORM, AND THE BURDEN OF GOING FORWARD WITH THE EVIDENCE WITH RESPECT TO SUCH REGISTRATION OR FORM SHALL BE UPON HIM.** (emphasis added)

Sec. 811 (a)

(a) **THE ATTORNEY GENERAL SHALL APPLY** the provisions of this subchapter to the controlled substances listed in the schedules established by

section 812 of this title and to any other drug or other substance **ADDED** to such schedules under this subchapter. Except as provided in subsection (d) and (e) of this section, **THE ATTORNEY GENERAL MAY BY RULE --**

(1) **ADD TO SUCH A SCHEDULE** or transfer between such schedules **ANY DRUG OR SUBSTANCE IF HE--**

(A find that such drug or other substance has a potential for abuse, and

(B makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance form the schedule if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party. (emphasis added)

Sec. 871

(a) The Attorney General may delegate any of his functions under this subchapter to any officer or employee of Department of Justice.

Reorganization Plan No. 1 of 1968

Title 28 U.S.C.

Sec. 510

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any officer, employee or agency of the Department of Justice of any function of the Attorney General.

The Federal Register Volume 28, No. 115

Sec. 1, 8, 9

The requirements imposed upon the anorectic substances controlled by this order shall become effective as follows:

1. **REGISTRATION** - Unless currently registered to conduct that activity with Schedule III (or in the case of fenfluramine, Schedule IV) non-narcotic substances, or unless exempted from registration by law, or pursuant to 301.24 - 301.28 or 311.24 - 311.28 of Title 21 of the Code of Federal Regulations, any person who manufactures, distributes, dispenses, imports, or exports benzphetamine, chlorphentermine, clortermine, fenfluramine, mazindol, and phendimetrizine, or who proposes to engage in the manufacture, distribution, dispensing, importation, or exportation of any of those substances, shall **obtain a registration to conduct that activity on or before August 1, 1973. (emphasis supplied)**

8. **CRIMINAL LIABILITY** - Any activity with benzphetamine, chlorphentermine, clortermine, fenfluramine, mazindol, and phendimetrizine, not authorized by, or in violation of the Controlled Substances Act or the Controlled Substances Import and Export Act, conducted after June 15, 1973, shall be unlawful, except that any person who is not now registered to handle these substances but who is entitled to registration under those acts may continue to conduct normal business or professional practice with those substances between the date on which this order is published and the date on which he obtains the proper registration.
9. **OTHER** - In all other respects, this order is effective on June 15, 1973.

Dated June 12, 1973.

No. 75-843

In the Supreme Court of the United States

OCTOBER TERM, 1975

TIMOTHY C. BENISH AND MICHAEL GAICH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-843

TIMOTHY C. BENISH AND MICHAEL GAICH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the evidence was insufficient to support their conviction; that their actions did not come within the scope of the statute under which they were convicted; and that the Attorney General unlawfully delegated his authority under the statute.

Following a non-jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of distributing phendimetrazine, a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Each was sentenced to two years' probation and a $500 fine. The court of appeals affirmed (Pet. App. A).

The evidence showed that on July 25, 1973, an undercover agent of the Bureau of Narcotics and Dangerous Drugs met with petitioner Benish and indicated that he

desired to purchase large quantities of "black beauties" (Tr. 6-10). Benish said that he did not have a large quantity of the capsules with him, but could obtain them from his source, and that the capsules were "real dynamite" (Tr. 10). Benish gave the agent nine capsules as samples (Tr. 11-12) and agreed to obtain 10,000 capsules for future delivery (Tr. 9, 15-16); the agent agreed to pay 22 1/2 cents per capsule (Tr. 14).

On the evening of August 1, 1973, the agent again met with petitioner Benish. At first Benish refused to deliver the capsules directly to the agent. After some discussion, Benish and the agent drove to a parking lot where they met petitioner Gaich, who was in possession of two large plastic bags containing a total of 10,000 capsules (Tr. 18-19, 25-27). After examining the capsules, the agent paid $2,250 to petitioners and then departed with the capsules (Tr. 27). Subsequent laboratory analysis showed that the capsules contained phendimetrazine, a controlled substance.

1. Petitioners contend that the evidence was insufficient to support their conviction, since the government failed to prove that petitioners knew that the capsules contained phendimetrazine and that they knew that phendimetrazine is a controlled substance.

21 U.S.C. 841(a)(1) makes it unlawful "knowingly or intentionally * * * to * * * distribute * * * a controlled substance." To establish a violation, the government must prove that the defendant knowingly or intentionally distributed a substance, and that the substance is controlled. It is not necessary, however, also to prove that the defendant knew the generic name of the substance or that it is controlled. *United States* v. *Davis*, 501 F.2d 1344, 1346 (C.A. 9); cf. *United States* v. *Weiler*, 458 F.2d 474 (C.A. 3). To require such additional

proof would defeat the purpose of the federal regulation of dangerous drugs. Where, as here, "dangerous or deleterious devices or products * * * are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of [their] regulation." *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 565; cf. *United States* v. *Freed*, 401 U.S. 601; *United States* v. *Balint*, 258 U.S. 250, 254.

In the instant case, the evidence, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), was sufficient to establish that petitioners knowingly and intentionally distributed a substance which they knew to have certain characteristics and that the generic name of a substance with those characteristics is phendimetrazine. The sale was conducted in a clandestine manner; petitioner Benish indicated that he had sold the drug before, that he had experienced its effects, and that the government agent would find it to be "dynamite." The drug was phendimetrazine.

2. Petitioners further contend that their distribution of phendimetrazine on August 1, 1973, did not come within the scope of 21 U.S.C. 841(a)(1).

On June 15, 1973, phendimetrazine was added to the list of Schedule III controlled substances by order of the Director of the Bureau of Narcotics and Dangerous Drugs (38 Fed. Reg. 15719-15722). This order provided that anyone distributing or proposing to distribute phendimetrazine after that date must "obtain a registration to conduct that activity on or before August 1, 1973" (*id.* at 15722). In the interim a non-registered person could continue "to conduct normal business or profes-

sional practice" in the drug only if he were "entitled to registration" (*ibid.*).[1]

Contrary to petitioners' assertion, the interim provision did not permit anyone distributing such controlled substances or proposing to distribute them to obtain a registration to conduct such activity on or before August 1, 1973. To the contrary, by its terms, an unregistered distributor lawfully could distribute a controlled substance between June 15 and August 1 only if he were "entitled to registration" during that interim period. Petitioners, who did not register, failed to show that they were "entitled to registration."

It was not necessary for the government to allege and prove that petitioners did not come within this exception. "[I]t is incumbent on one who relies on such an exception to set it up and establish it." *McKelvey* v. *United States*, 260 U.S. 353, 357; *United States* v. *Kelly*, 500 F.2d 72, 73 (C.A. 7).[2]

---

[1]The order, in pertinent part, provides that *(ibid.)*:

> Any activity with * * * phendimetrazine * * * conducted after June 15, 1973, shall be unlawful, except that any person who is not now registered to handle these substances but who is entitled to registration * * * may continue to conduct normal business or professional practice with those substances between the date on which this order is published and the date on which he obtains the proper registration.

Pursuant to 21 U.S.C. 823(e), the Attorney General is required to register an applicant to distribute a Schedule III controlled substance "unless he determines that the issuance of such registration is inconsistent with the public interest" because, *inter alia*, it would divert the substance "into other than legitimate medical, scientific, and industrial channels."

[2]Petitioners' reliance (Pet. 13) on *Turner* v. *United States*, 396 U.S. 398; *Leary* v. *United States*, 395 U.S. 6; and *Tot* v. *United States*, 319 U.S. 463, is misplaced, since in those cases the statutory presumptions permitted the jury to presume proof of one element of the offense on the basis of proof of another. Here, however, the government must sustain the burden of proof as to all elements of the offense; only the burden of showing an affirmative defense is placed on the defendant.

3. Finally, contrary to petitioners' contention, Congress authorized the Attorney General to delegate to other officers of the United States Department of Justice his authority to place drugs on the controlled drug schedules.

Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (84 Stat. 1242, 21 U.S.C. 801 *et seq.*) authorizes the Attorney General to add or to remove drugs from the schedules of controlled substances (21 U.S.C. 811), and permits the Attorney General to "delegate any of his functions * * * to any officer or employee of the Department of Justice" (21 U.S.C. 871(a)). Pursuant to this provision, the Attorney General has delegated the "[f]unctions vested in [him]" under that Act to the Administrator of the Drug Enforcement Administration (formerly Director of the Bureau of Narcotics and Dangerous Drugs) (28 C.F.R. 0.100).[3]

[3]Petitioners' reliance (Pet. 17) on *United States* v. *Giordano*, 416 U.S. 505, is misplaced. There, this Court held that the statute generally authorizing the Attorney General to delegate his functions (28 U.S.C. 510) was inapplicable to applications for court orders authorizing wiretaps, because in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, Congress expressly limited delegation of the Attorney General's authority to apply for such court orders to "any Assistant Attorney General specially designated by the Attorney General" (18 U.S.C. 2516(1)). By contrast, the Comprehensive Drug Abuse Prevention and Control Act places no limitation on delegation of the Attorney General's authority to place drugs on the controlled drug schedules. In fact, it authorizes the Attorney General to designate *any* officer or employee of the Department of Justice to place drugs on the schedules of controlled substances. See *United States* v. *Nocar*, 497 F.2d 719, 723 (C.A. 7), certiorari denied, 419 U.S. 1038.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

DOJ-1976-02